No. 67

Brief for Appellee

Filed Oct. 29, 1900.

Supreme Court of the United States

OCTOBER TERM, A. D. 1900

NO. 67.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS and A. J. DAGGS, *Appellants,*

vs.

JAMES WILSON, *Appellee.*

BRIEF FOR APPELLEE.

D. H. PIERCY and
LOUIS T. DUKE,
Attorneys for Appellee.

Judd Printing Co., 1013 W. Lake Street, Chicago.

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vs.
JAMES WILSON, *Appellee.*

Appeal from the Supreme Court of Arizona.

BRIEF FOR APPELLEE.

In April, 1893, the appellee, James Wilson, being the owner of the premises in controversy, sold and conveyed the same to John S. Armstrong, and for the payment of the balance of the purchase money Armstrong made and executed his two promissory notes in the sum of $3,250 each, dated April 24, 1893, and to secure the payment of

said notes executed a mortgage on the said premises, which said mortgage was duly filed of record May 1, 1893. (Tr., pp. 50–53.)

On the 18th day of December, 1893, Armstrong sold and conveyed his interest in the premises to R. E. Daggs. Daggs, in and by said conveyance, assumed and agreed to pay the two promissory notes executed by Armstrong and secured by mortgage on the premises. (Tr., p. 35.)

The first of said notes not being paid at maturity, and there being a provision in the mortgage that in case default should be made in any of the conditions of said mortgage, then and in such case the whole principal sum should become due and payable. An action was commenced in the District Court of Maricopa County on the 26th day of April, 1894, by *James Wilson vs. John S. Armstrong and Robert E. Daggs* to foreclose the mortgage. (Tr., p. 39.) Summons was duly served on Armstrong on the 26th day of April, 1894, and on Daggs on the 27th day of April, 1894. (Tr., p. 44.) Also, on the 26th day of April, 1894, notice of *lis pendens* was filed in the office of the county recorder. (Tr., p. 141.) After service of summons and after the filing of notice of *lis pendens*, and on the 28th day of April, 1894, A. J. Johns filed for record a deed purporting to convey the premises in question from R. E. Daggs to himself. (Tr., p. 142.) The case proceeded to judgment against Armstrong and Daggs, a decree of foreclosure was ordered and the property sold for the full amount of the judgment. (Tr., pp. 45–55.) At the time of the commencement of the action on April 26th, appellee had no knowledge or information whatsoever that any person had any claim to said premises except Armstrong and Daggs. (Tr., p. 142.) No

redemption having been made from the sale of June 6, 1894, the sheriff on the 12th day of December, 1894, executed a deed of conveyance for the premises to appellee; demand of possession was then made under that deed from W. A. Daggs, then in possession, and he refused to surrender the same and claimed that he was then the tenant of A. L. Johns, although at the time of the commencement of the action against Armstrong and R. E. Daggs, W. A. Daggs was in possession of the premises for R. E. Daggs. (Tr., p. 141.) This would seem to be the first actual notice that appellee had that Johns claimed any interest in the premises.

On the 22nd day of June, 1895, appellee filed his complaint against the appellants, setting up the facts of the execution of the notes by Armstrong the assumption of their payment by Daggs, that on March 17, 1894, Daggs executed a deed to A. L. Johns, that the same was withheld from record until April 28, 1894, that in said deed Johns assumed and agreed to pay the Armstrong notes and mortgage, that W. A. Daggs was in possession as tenant of R. E. Daggs; that W. A. Daggs and A. J. Daggs conspired together with R. E. Daggs and A. L. Johns in making the deed to Johns for the purpose of hindering, obstructing and delaying and defrauding the appellee. The complainant asks that a foreclosure may be had and that appellees' mortgage may be adjudged to be wholly unpaid and unsatisfied, and for a judgment against the appellants on the mortgage and for $1,000 damages. Upon the hearing judgment was rendered in March, 1897, setting aside the sale had under the forclosure suit of *Wilson vs. Armstrong and Daggs*, and ordering a sale of the premises as against R. E. Daggs and A. L. Johns who had assumed and agreed to pay the mortgage debt, declaring the mort-

gage a lien upon the premises, also finding that appellants had fraudulently conspired together to cheat, wrong and defraud the appellee; and declarlng the deed of Daggs to Johns to be fraudulent and void, this judgment provided that the judgment in the case of *Wilson vs. Armstrong and R. E. Daggs* should stand and that writ of execution issue thereon and ordering sale of premises to satisfy the full amount due on the notes and mortgage. (Tr., p. 56). A sale of the premises was ordered under this judgment in both cases on the 10th day of April, 1897. (Tr., p. 71). And bid in by appellee for the sum of $2,000, leaving a deficiency decree of $6,861.26. (Tr., p. 74.) The Supreme Court affirmed this judgment, except as to the deficiency against Johns. (Tr., p. 112).

On the facts as they appear in the record there can be no question about the fraud and conspiracy in the Daggs-Johns deal. On pages 26 to 33 appears the evidence in full of R. E. Daggs, the chief actor in the matter. He testifies that W. A. Daggs was then in possession of the premises in question for the London Company, that he was first in possession for him, R. E. Daggs, afterwards in possession for A. L. Johns and had continued in possession right along for the owner of the land, and when Johns conveyed the land to the London Company that W. A. Daggs continued to act as agent for that company. He then testified that the London Company was incorporated by A. J. Daggs as president and himself as secretary, also that the London Company paid A. L. Johns $10,000 in stock for the premises in question. He also testifies that Johns paid him $1,150 on March 17, 1894 for the same premises, and that he received his pay in cattle and a lot of notes and accounts which Johns turned over to him, and this witness described

in detail what these notes and accounts were, also that 2,000 head of sheep was received from Johns in part payment. A. L. John testifies that he purchased the land from R. E. Daggs through his agent, A. J. Daggs, and paid the purchase money, $2,450, when he received the deed, March 17, 1894. He also testifies that he sold the premises back to A. J. Daggs, for the sum of $2,600; and received his pay all in cash. (Tr., pp. 146-147). "I informed A. J. Daggs that his money was ready for him when he delivered me the deed, and on March 17, 1894, I paid him $2,550 in cash and took the deeds, also his receipt for the money in full." Comment is unnecessary when such testimony as this, together with other facts, and circumstances are produced before the trial court on the question of fraud.

In the opinion of the Supreme Court of the Territory the court refer to errors assigned so there must have been some errors assigned in that court, but the record does not disclose what the errors assigned were, except that on a petition for a rehearing certain errors are referred to as having been assigned which are difficult to understand.

The errors noticed and passed upon by the lower court are four in number, (Tr., p. 110):

First. That the grantees of the original mortgagor were not liable to a direct action by the mortgagee because no privity of contract was shown in the pleading, and the action not being brought in the name and for the benefit of the mortgagor.

Second. That the former judgment is conclusive against the parties to the action, and the plaintiff having one judgment cannot bring a second suit.

Third. That the plaintiff has made a misake of law and the court has no jurisdiction to grant relief.

Fourth. That the court rendered a personal judgment against defendant Johns for full amount of the debt after having adjudged his deed of conveyance to be fraudulent and void.

The appellants bring the record into this court and assign a long list of errors for the consideration of this court; whether they are the same as were assigned in the court below does not appear.

No notice can be taken of errors unless they were properly assigned in the appellate court; appellants will not be permitted to present assignment of errors here which were not presented in the court below.

Lichtenstandt vs. Rose, 98 Ill., 643.
Thayer vs. Peck. 93 Ill., 357.

This court is only called upon to pass upon such errors as were assigned upon the record before it, and the judgment of the appellate court cannot be impeached for failure to sustain an error that was not assigned.

Hanson vs. Miller, 145 Ill., 538.

And so a judgment for costs against appellant not assigned for error in the appellate court cannot be urged for the first time in this court.

Hyslop vs. French, 99 Ill., 171.

The 4th assignment of error having been sustained by the Territorial Court, A. L. Johns has nothing to complain of except the setting aside of his deed. In no other respect has he been injured. His complaint about that is not that the facts do not justify it, but that some other form of action should have been brought for that purpose.

It was not necessary to have made Johns a party to the first foreclosure proceedings at all. He having filed his deed after notice of *lis pendens*, and after the service of summons on his grantor, he was therefore bound by that proceeding on judgment of foreclosure to the same extent as if made a party to the suit.

Am. & Eng. Enc. of Law, Vol. 13, 907.
Wilstie on Mortgage Foreclosure, p. 371.

As an incident to the proceeding to foreclose the rights of Johns in the premises, a decree was made declaring his deed fraudulent and void, and decreeing a sale of the premises as against R. E. Daggs.

It was not necessary to make Armstrong, the mortgagor, a party to that second proceeding, his rights had already been disposed of in the first foreclosure.

Benedict vs. Gilman, 4, page 58.
Morey vs. City of Duluth, 71 N. W., 694.

The Supreme Court of the Territory have found the facts relied on for the hearing of the case. (Tr., p. 140).

Respectfully submitted.

D. H. PINNEY and
LOUIS T. ORR,
Attorneys for Appellee.